upon what they referred to as a common law claim for damages on the footing of a beach of contract already committed by the defendant. In the present case, the plaintiff clearly elected to treat the contract as in force notwithstanding the defendants' default, so that his claim for damages was not sustainable as an independent claim.

I would therefore allow the appeal, setting aside the judgment appealed from and substituting in its place a declaration in terms of prayer 1 of the amended statement of claim and an order by way of specific performance that within seven days of the issue of the grant of probate to them the defendants do apply to have the land in question transmitted to them as personal representatives of the deceased, that within seven days from the date of their being registered as personal representatives they do make an application at their own expense under section 137 of the National Land Code for approval of the sub-division of the land comprised in Holding 143 so as to obtain a separate title to the portion sold to the plaintiff, and that within fourteen days of the issue of such title to them they do execute a valid and registrable transfer of the said portion in favour of the plaintiff. The respondent to pay the costs of this appeal to the appellants. There will be liberty to apply to both parties.

Azmi L.P. and **Suffian F.J.** concurred.

Appeal allowed.

Solicitors: *Sault, Thara & Co.; Allen, Gledhill & Ball.*

JONG CHAN SIONG v. LOH SHUI KIN

[F.C. (Ismail Khan C.J. (Borneo), Gill F.J. and Pawan Ahmad J.) March 5, 1973

[Kuching — Federal Court Civil Appeal No. 49 of 1972]

Will — Bequest for benefit of family — Meaning of "family" — Whether includes adopted children — Chinese custom in Sarawak — Kheh community — Expert evidence.

Chinese Customary Law — Kheh community — "Family" — Whether includes adopted children.

This was an appeal from the decision of the learned judge of the High Court at Kuching who had held that the respondent and one Jong Chee Chin, an adopted son of the testator were the only persons entitled to the residuary estate of the testator. The testator had a number of adopted children, besides Jong Chee Chin. In his will he made bequests for the benefit of his family and the question for determination was the construction to be placed on the word "family". The learned judge accepted expert evidence that the word "family" according to the usage of the Tai Poo Kheh community, would include the adopted sons as persons entitled to share in the estate of a deceased. The learned trial judge however held that the word "family" could only refer to the respondent and Jong Chee Chin as they were the persons whose names were mentioned in the will. The appellant, an adopted son, appealed.

Held, allowing the appeal: the word "family" in the will must be given its ordinary meaning among the Tai Poo Kheh community and must be read to mean the respondent and all the adopted sons of the deceased.

Case referred to:-

(1) *Perrin* v. *Morgan* [1943] A.C. 399 at p. 420.

FEDERAL COURT.

Sim Teck Kui for the appellant.

Fong Joo Chung for the respondent.

Ismail Khan C.J. (Borneo): By his will dated the 10th day of March, 1952, the testator, Jong Siang Fam, after making certain specific bequests, directed in clause 7 thereof as follows: —

"7. I devise and bequeath to my trustees all the residue of my real and personal estate as follows:

(a) one shophouse at No. 21 Padungan Road, Kuching,

(b) one shophouse at No. 39 Wayang Street, Kuching,

(c) one shophouse at No. 61 Wayang Street, Kuching,

(d) one shophouse at No. 63 Ewe Hai Street, Kuching,

(e) The $20,000 share in the Nyan Shin Pawn Shop, Kuching, upon the trusts following, that is to say:

(a) Upon trust to pay or provide for my debts funeral and testamentary expenses and the said legacies.

(b) Upon trust to provide $20,000 for the erection of any permanent building or buildings for educational or cultural use in my name as my trustees in their uncontrolled discretion shall decide.

(c) Upon trust out of the income of the trust property to pay to my said wife the monthly allowance of $150 for the maintenance of herself and the said Jong Chee Chin, to provide a fund for the relief of the poor in my "Jau Hah" village in China as well as for scholarships and to give welfare or educational institutions in Kuching which appeal for public help such sum of money as my trustees in their uncontrolled discretion shall determine.

(d) Subject as aforesaid my trustees shall invest the residue of all clear moneys and stand possessed of such investments and of the residue of such investments as aforesaid which formed part of my estate at the time of my death and of all parts of my estate for the time being unsold for the *benefit of my family.*

(e) Subject as aforesaid upon trust to hold the capital and income of my residuary estate *for my family* until my adopted son Jong Chee Chin attains the age of 21 years."

The testator died on the 17th day of February, 1953.

In December, 1953, Loh Shui Kin, his widow, co-executrix and trustee of the will, took out a summons in the High Court at Kuching to determine, *inter alia,* whether she and one Jong Chee Chin, an adopted son of the testator, were the only persons entitled to the residuary estate of the testator.

In the event the learned judge decided in favour of the applicant. From this judgment, Jong Chan Siong, another adopted son of the testator, appealed.

In this appeal the question for determination is the construction to be placed on the word "family" appearing in clause 7(2)(d) and (e) of the will.

For a better appreciation of the point raised, I set out below the facts forming the background to the dispute.

The testator was a Tai Poo Kheh. In his lifetime he carried on the business of a printing press and owned considerable property. He married twice. His first wife, Siaw Chii (hereinafter called the deceased) predeceased him. There was no issue of the marriage. During the lifetime of the deceased, she and the testator adopted two of his nephews — the appellant, a son of the testator's brother one Jong Joon Fam, and

Jong Chan Choon, a son of another brother Jong Fui Fam.

The names of these two adopted sons appear on the tombstone of the deceased and also on that of the testator.

In 1947 the testator married the respondent Loh Shui Kin. They had no children. They adopted the said Jong Chee Chin, a boy, and Jong Oi Lian, a girl.

The testator's will was written in Chinese. It was lost, but there is an English translation. The parties have not questioned the correctness of this translation.

Two witnesses from the Kheh community called by the parties gave expert evidence of their customary law as to adoption and of what is understood by the term "family" under such law. The effect of this evidence is that an adopted son is entitled to a share in the estate of a deceased person like any natural son and that there is no difference between the adopted sons of the first and second wives. The word "family" would include the deceased's unmarried widow, his natural and adopted sons and unmarried daughters although the daughters have no right of inheritance.

The learned judge was satisfied from the evidence that the appellant and Jong Chan Choon are the adopted sons of the testator, notwithstanding the non-registration of their adoption under the Sarawak Adoption of Children Orders of 1875 and 1902 which applied to them. In my view, this is correct as there is nothing in these orders to say that failure to register would invalidate the adoption. The only effect of non-registration would be that the court would not render any assistance to the adoptive parents in the event of the natural parents endeavouring to withdraw or entice away their child from the adoptive parents. The learned judge accepted the expert evidence that the word "family", according to the usage of the Tai Poo Kheh community, would include the adopted sons as persons entitled to share in the estate of a deceased.

However, in the instant case the learned judge held that the word "family" could only refer to the respondent Loh Shui Kin and the adopted son, Jong Chee Chin. He held that the ordinary meaning of the word must yield to this narrower interpretation on the grounds that (1) under clause 5 of the will the appellant was not included among those persons who were entrusted with the management of the testator's printing press and (2) neither the appellant nor Jong Chan Choon was given any share of the income under clause 7(2)(c) of the will. And according to the judge —

"A perusal of the will would show that the widow's name was mentioned six times, in clause 1 as co-executor/co-trustee, in clause 2(a) as a beneficiary, in clause 4(a) also as a beneficiary, in clause 5 she was expressly named as a treasurer, in clause 6 and in clause 7(2)(c). The legally adopted son, Jong Chee Chin's name also appeared the same number of times in the will in clause 2(b) as a beneficiary, in clause 4(d) as a beneficiary, in clauses 5 and 6, and in clause 7(2)(c) and (e). On the other hand, the names of the adopted daughter, Jong Chan Joon and Jong Chan Siong were only mentioned once in clause 3(a) and clause 4(e) and (f) of the will. In my opinion, the number of times in which the names of the beneficiaries or members of the deceased's family was mentioned in a will is not without significance."

With respect, I do not agree. The fact that the appellant was excluded from the management of the printing press is of no importance as it might possibly be due to lack of expertise. As to the second ground, clause 7(2)(c) provides for the payment of $150 out of income, to the respondent and Jong Chee Chin, but that was because the latter was a minor under the care of the respondent. The appellant was then 30 years of age and earning his own living.

It is true that the names of the respondent and the adopted son, Jong Chee Chin appeared more than once in the will. That was because the testator had made several bequests to them. In my view, this circumstance is in favour of the appellant.

In *Perrin* v. *Morgan*,[1] Lord Romer said:

"...a will should be so construed as to give effect to the intention of the testator, such intention being gathered from the language of the will read in the light of the circumstances in which the will was made. To understand the language employed the court is entitled, to use a familiar expression, to sit in the testator's armchair. When seated there, however, the court is not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said...."

The testator's intention is apparent from his use of the word "family" in the will. He wrote out the will himself in Chinese and must have used the word deliberately knowing the meaning attributed to it in his society. The law is that:

"The ordinary meaning of a word is the meaning given to it by the ordinary usage of society, that is to say, the testator's society, of that class and period in which he lived and moved. Accordingly, in order to discover the ordinary meaning of any word, the court may not only consult dictionaries of good reputation, or other contemporary literary sources, but may also consider evidence of the meaning customarily given to the word by persons in such society...."

(See *Halsbury*, 3rd Edition, Vol. 39 page 962 paragraph 1456). In the instant case the expert evidence is quite clear as to the meaning customarily given to the word "family". The testator had made generous dispositions of his property in various clauses in the will for the benefit of the respondent and Jong Chee Chin and it is a reasonable inference that the testator intended to compensate his two other adopted sons, the appellant and Jong Chan Choon by giving them a share in the residuary estate.

Had the testator's intention been to benefit only the respondent and Jong Chee Chin, nothing would have been simpler than for him to have inserted their names in the will in place of the word "family" In my view, the word "family" in clause 7(2)(d) and (e) must be given its ordinary meaning among the Tai Poo Kheh community, and must be read to mean the respondent, the appellant, Jong Chan Choon and Jong Chee Chin.

The appeal is allowed.

Costs here and in the court below as between solicitor and client will be paid out of estate.

Gill F.J. and **Pawan Ahmad J.** concurred.

Appeal allowed.

Solicitors: *Yong & Co.; Reddi & Co.*